In The

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Supreme Court of the United States

October Term, 1973

73-972

JAMES CARFORA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner James Carfora petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered November 21, 1973 (Docket No. 73-1824).

The judgment affirmed the decision and order of the district court revoking probation, after evidentiary hearings, and imposing imprisonment (No. 71 CR 31-SDNY).

Circuit Judge Feinberg dissented from the opinion of the Court of Appeals, and filed a dissenting opinion (Slip opinion, Appendix A, 4a).

OPINION BELOW

The opinions of the Court of Appeals, both the majority and the dissenting, are not yet reported, and is set forth as Appendix A.

The opinion of the district court is not reported, and is set forth as Appendix B.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Court of Appeals is authorized by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the fifth amendment, and more specifically, the due process clause.

ISSUES PRESENTED

Did the Court of Appeals err, contrary to the requirements of the due process clause, when it affirmed a probation revocation order of the district court, without requiring the district court to make necessary findings of fact?

Did the Court of Appeals err, contrary to the requirements of the equal protection clause, when it affirmed a probation revocation order of the district court, without requiring the district court to make a finding that the probationer had the funds to pay the court-imposed restitution?

Issues Presented

Did the Court of Appeals err, contrary to the due process clause, when it held that the order of the district court was one of "broad discretion", and did not require necessary findings of fact or compliance with other constitutional requirements?

Did the Court of Appeals err, contrary to the holdings of *Gagnan v. Scarpelli*, 411 U.S. 778 (1973) and *Morrissey v. Brewer*, 408 U.S. 471 (1972), when it affirmed the probation revocation order of the district court, which order was made upon findings not charged in either the revocation petition or the revocation specifications? Is oral notice of these charges sufficient? Can the judgment of the district court be considered as one solely within the "broad discretion" of the district court, without regard to constitutional requirements?

PRELIMINARY STATEMENT

On March 6, 1972, Carfora was convicted of mail fraud (18 U.S.C. Section 1341) with regard to the purchase of airline tickets from TWA, United Airlines, and Eastern Airlines. He was placed on probation for a two year period, fined the sum of $2500, and directed as a special condition of probation to make restitution to the several airlines by April 1, 1972.*

Three months later, on June 20, 1972, the probation office filed a revocation proceeding charging that Carfora had failed to make the required restitution to the airlines. The district court conducted an evidentiary hearing, and

* Petitioner did not appeal from this judgment.

dismissed the petition because of Carfora's financial inability to pay. The district judge modified this special condition to permit Carfora to make restitution in the form of monthly installment payments through the probation department.

Two months later, on August 16, 1972, the probation department filed a second revocation petition, charging three specifications (see footnote 1, at slip opinion 3a):

1. Failure to report to the probation office on August 15th;

2. Failure to make the first installment payment to Eastern Airlines;

3. Failure to make the July installment payment to Trans World Airlines.

At an evidentiary hearing in September, Carfora did not deny he had not made the installment payments—he claimed he was financially unable to pay due to business difficulties and illness. The district court reserved decision pending further inquiry into Carfora's financial situation, and directed that he produce his books and records for examination by the government, which he did. Five more hearings were held, at which the government introduced "extensive evidence of Carfora's various shady dealings with his creditors." (dissent, slip opinion 6a).

On May 4, 1973 the district court filed an opinion setting forth findings of fact in support of his conclusion

that probation should be revoked. Judge Gurfein dismissed the first specification – the failure to report – and gave Carfora the benefit of the doubt as to the mix-up of dates (See footnote 2 of slip opinion 6a). In his opinion, District Judge Gurfein wrote (quoted in dissent, 12a):

> "It developed that there had been instances where Carfora allegedly committed fraud upon creditors and breaches of ethical business conduct. He was informed that the Government was making these charges. "
>
> * * *
>
> "The picture presented is of a struggling, marginal small business man who is willing to rely on shady practices to keep going. He had avoided bankruptcy thus far but at the expense of unwitting lenders. His practices, as disclosed, do not show a probationer worthy of trust.
>
> It is not easy to revoke probation especially when care must be taken not to penalize penury. But I have come to the said conclusion that probation is not enough of a deterrent for Carfora."

The opinion of the district court is succinctly summarized by the dissent (slip opinion 7a):

> "The judge then found that the Government had established 11 instances of such misconduct, including Carfora's use of different corporate and trade names to mislead his suppliers and lenders, false testimony concerning the assets possessed by his companies, creation of fictitious accounts receivable to mislead his creditors, and issuance of checks with intent to pass bad checks or with reckless disregard of the state of his bank balance, which was insufficient."

Both the majority opinion and the dissent are in agreement that the district court never made a finding that probation was being revoked because Carfora was able, but unwilling, to make the two restitution payments, as charged in specifications Nos. 2 and 3. The dissent set forth the problem (slip opinion 8a):

> "However, the district court made no finding that Carfora had the financial means to make the installment payments, a crucial issue under our holding in United States v. Wilson, 469 F.2d 368 (1972). See United States v. Taylor, 321 F.2d 339, 341-42 (4th Cir. (1963).) Indeed, the judge's opinion suggests, in its description of Carfora as a struggling businessman who has managed to stave off bankruptcy only by defrauding creditors, that the court believed appellant to be in serious financial difficulty."

The majority opinion noted the problem (slip opinion 3a), as follows:

"While it is true that the judge did not find in haec verba that appellant was financially able to make the payments to the airlines which he had been ordered to make, the entire tenor of the findings when read in the context of the record as a whole leaves us with the firm conviction that it was appellant's refusal to make the restitution payments to the airlines, although financially able to do so, that lead to revocation of his probation."

The majority opinion continued (slip opinion 3a):

"The judge found, among other things, that appellant's wholly owned company, Worldwide Electric Corporation, owned a truck, although appellant had falsely testified that it did not own an automobile; certainly a truck is an asset of value. Appellant testified that he had been 'robbed' on April 5 and 13, 1972, although he did not report such robberies until the day before the first revocation hearing; presumably one does not claim to have been robbed unless property of value is taken, especially when the robberies are offered as an explanation of a loss of assets. There was other evidence of appellant's financial ability to make the restitution payments.

Our careful examination of the record satisfies us that Judge Gurfein's findings are fully supported by the evidence and that they more than adequately warrant his exercise of discretion in revoking probation. The record as a whole clearly

> establishes that Judge Gurfein intended to, and did, revoke appellant's probation on the ground that he did not fail to make the payments to the airlines because of penury and that he did have the means to pay."

The dissent was disturbed that the opinion of the district court, and the state of the evidentiary record, evidenced that probation was revoked solely because of Carfora's unethical business dealings with his creditors — a charge never made in the revocation petition and specifications. As such the dissenting opinion saw a substantial due process question in revoking probation on charges never made (slip opinion 9a):

> "Despite this, the record supports Carfora's position that at least during and after the third hearing the Government presented Carfora's allegedly unethical business dealings as an independent ground for revoking probation. And the district court's discussion of these dealings, which constitutes the bulk of its opinion, makes no mention of the limited purpose for which evidence concerning them was initially received; in fact, it refers to the alleged instances of unethical conduct as 'charges' which the Government was making against appellant. Thus, it appears quite possible that this conduct provided the basis for the court's decision to revoke probation.
>
> If this is so, however, other issues immediately become significant. There is no question that the demands of due process extend to proceedings for

revocation of probation. Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972). Carfora contends that an essential element of due process is written notice of the specific charges which form the basis of an attempt to revoke probation. Gagnon, 411 U.S. at 786; Morrissey, 408 U.S. at 488-89. The Government does not claim that it ever filed a written amendment to its petition or specification of charges, as it apparently represented it would. See note 3 supra. Instead, the Government argues that the requirements of due process were met since Carfora received oral notice of the additional charges and a full opportunity to confront and controvert the evidence against him. I express no view on these issues, except to observe that the due process questions are substantial (Contrast, for example, the generality of the oral notice, quoted in note 3 supra, with the specifity of the written charges in the revocation petition, quoted in note 1 supra)."

The majority sought to avoid these substantial issues, and preferred to dispose of the entire matter by reference to the less articulate notion of the "exercise of discretion" by the district court. In this regard the majority opinion stated: "The sole issue is whether the district judge abused his discretion", and "Judge Gurfein acted well within the broad discretion granted to district judges in determining that probation should be granted" (Slip opinion 4a).

REASONS FOR GRANTING THE WRIT

Both the majority opinion and the dissent are in accord that the district court never made a finding that probation was being revoked because Carfora was able, but unwilling, to make the two restitution payments, as charged in specifications Nos. 2 and 3. The dissent points out that the district court "believed appellant to be in serious financial difficulty", and that the basis of revocation was Carfora's "allegedly unethical business dealings" — an independent ground which was never charged in either the revocation petition or the specifications. The majority opinion was hard pressed to confront the persuasiveness of this argument, and side-stepped it by conceding that the district court "did not find in haec verba that appellant was financially able to make payments to the airlines". The majority stressed that Carfora owned a truck for his business, and claimed to have been "robbed" of certain assets. As such the majority inferred that the district court revoked probation because Carfora was financially able to pay. Basically the majority preferred to view the decision of the district court as the "exercise of discretion" — "the sole issue is whether the district judge abused his discretion" — "Judge Gurfein acted well within the broad discretion granted to district judges in determining that probation should be revoked."

The opinion of the Court of Appeals permits a revocation of probation, and the imposition of a prison sentence, without the necessity of the district court making a finding of the probationer's ability to make required installment payments. In this regard the opinion presents two constitutional problems — a due process one, for revocation (and imprisonment) was made without a

required finding; and an equal protection one, for revocation (and imprisonment) was made and affirmed in the face of overwhelming evidence that the probationer lacked the funds to pay the court-imposed restitution. Furthermore the majority disposed of the issue as one solely within "the broad discretion" of the district court.

It is in order for this Court to review these issues to fashion appropriate rules for probation revocation proceedings. What findings are required to be made by a district court before probation can be revoked? Can probation be revoked when the probationer lacks the funds to pay a court required restitution installment? Can the matter be disposed of as solely one of "broad discretion"?

The dissenting opinion clearly demonstrates that the findings of fact made by the district court shows in effect that probation was revoked because of "allegedly unethical business dealings as an independent ground for revoking probation." Furthermore the dissent sees a "substantial due process question" for "the government does not claim that it ever filed a written amendment to its petition or specification of charges, as it apparently represented it would. Instead the government argues that the requirements of due process were met since Carfora received oral notice of the additional charges * * * (contrast) . . . the generality of the oral notice . . . with the specificity of the written charges in the revocation petition . . .".

As such it is appropriate for this Court to review as to whether probation can be revoked on grounds not charged

in either the revocation petition or the specifications. Also can probation be revoked on generalized oral notice as opposed to specified written notice. The dissent pointed out "that the demands of due process extend to proceedings for revocation of probation. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972)." The majority opinion brushed aside these constitutional requirements, and preferred to view the matter as solely within the "broad discretion" of the district court — as if acts of judicial discretion need not conform to procedural and substantive guidelines.

CONCLUSION

It is requested that the petition be granted.

Respectfully submitted,

s/ H. ELLIOT WALES
Counsel for Petitioner

APPENDIX A

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 313—September Term, 1973.

(Argued October 4, 1973 Decided November 21, 1973.)

Docket No. 73-1824

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES CARFORA,

Appellant.

Before:

MEDINA, FEINBERG and TIMBERS,

Circuit Judges.

Appeal from a judgment entered in the Southern District of New York, Murray I. Gurfein, *District Judge,* after evidentiary hearings, revoking probation and imposing imprisonment.

Affirmed.

H. ELLIOT WALES, New York, N.Y., for *Appellant.*

ROBERT B. HEMLEY, Asst. U.S. Atty., New York, N.Y. (Paul J. Curran, U.S. Atty., Kenneth R. Feinberg and John D. Gordan III, Asst. U.S. Attys., on the brief), *for Appellee.*

Opinion of the Court of Appeals

PER CURIAM:

On this appeal from a judgment entered May 4, 1973 in the Southern District of New York, Murray I. Gurfein, *District Judge,* after extensive evidentiary hearings, revoking probation and imposing a two year term of imprisonment to be suspended after four months, the sole issue is whether the district judge abused his discretion. We hold that he did not. We affirm.

Revocation of appellant's probation was a sequel to his conviction on January 14, 1972, after a four day jury trial before Judge Gurfein, of nine counts of mail fraud in connection with his fraudulent purchase of tickets from certain airlines in violation of 18 U.S.C. §1341 (1970). On March 6, 1972, Judge Gurfein imposed what strikes us as a lenient sentence: two years probation and a $2500 fine to be paid in installments under the supervision of the probation department. In addition to the usual conditions of probation, a special condition was imposed requiring appellant to make full restitution to the defrauded airlines by April 1, 1972.

Shortly after being placed on probation, appellant was charged with violating his probation. On June 20, 1972, the probation office filed a revocation petition charging that appellant had violated the provision that he make restitution. After notice to appellant, Judge Gurfein held an evidentiary hearing on June 26, at the conclusion of which he stated that he would not consider poverty as a ground for revocation; he modified the restitution schedule and required appellant to make payments to the airlines thereafter through the probation department in monthly installments.

On August 16, 1972, the probation office filed a second revocation petition charging that appellant had violated his probation in three respects: he had failed to report

to the probation officer on August 15;[1] he had failed to make the July restitution payment to TWA which he had been ordered to make; and he had made a first installment payment to Eastern Airlines with a check that had bounced. Beginning September 26, 1972 and extending through January 30, 1973, hearings on this revocation petition were held on six separate days. Appellant was required to produce his books and records. He testified on his own behalf. Testimony was taken from appellant's creditors. His bank records were received in evidence.

On May 4, 1973, Judge Gurfein filed an opinion setting forth findings of fact in support of his conclusion that probation should be revoked. While it is true that the judge did not find *in haec verba* that appellant was financially able to make the payments to the airlines which he had been ordered to make, the entire tenor of the findings when read in the context of the record as a whole leaves us with the firm conviction that it was appellant's refusal to make the restitution payments to the airlines, although financially able to do so, that lead to revocation of his probation. After all, the restitution payments due were relatively small: $390 to Eastern Airlines and $364.65 to TWA. The judge found, among other things, that appellant's wholly owned company, Worldwide Electric Corporation, owned a truck, although appellant had falsely testified that it did not own an automobile; certainly a truck is an asset of value. Appellant testified that he had been "robbed" on April 5 and 13, 1972, although he did not report such robberies until the day before the first revocation hearing; presumably one does not claim to have been robbed unless property of value is taken, especially when the robberies are offered as an explanation

1 Judge Gurfein dismissed this asserted ground for revocation of probation, having found that there was a mix-up in dates and that appellant should have the benefit of the doubt.

of a loss of assets. There was other evidence of appellant's financial ability to make the restitution payments.

Our careful examination of the record satisfies us that Judge Gurfein's findings are fully supported by the evidence and that they more than adequately warrant his exercise of discretion in revoking probation. The record as a whole clearly establishes that Judge Gurfein intended to, and did, revoke appellant's probation on the ground that he did not fail to make the payments to the airlines because of penury and that he did have the means to pay.

We find no merit in appellant's claims that his probation was revoked on grounds not charged and that the district court did not find that appellant had violated any specific conditions of probation.

We hold that Judge Gurfein acted well within the broad discretion granted to district judges in determining that probation should be revoked.

Affirmed.

FEINBERG, *Circuit Judge* (Dissenting):

I dissent from affirmance of the order revoking probation. I would remand to have Judge Gurfein make specific findings as to the basis for his order. A remand is necessary because it is not at all clear that Carfora's probation was revoked because of his willful failure to make restitution payments. Indeed, it is just as probable—if not more so—that his probation was revoked because he did not conduct himself as an honest businessman, a grievous fault, to be sure, but not one charged in the Government's petition to revoke his probation. If that were the case, a serious constitutional issue, ignored by the majority opinion, would be raised. The majority concedes that Judge Gurfein "did not find *in haec verba* that appellant was financially able to

make the payments . . . he had been ordered to make." It may well be that this finding was omitted not inadvertently but because the judge revoked probation on a wholly different ground. Under such circumstances, we should remand to be sure of the basis for revocation.

The judgment appealed from was a sequel to Carfora's conviction over a year before of mail fraud, 18 U.S.C. §1341. Carfora's fraudulent transactions had included the purchase of airplane tickets without intent to pay from Trans World Airlines and Eastern Airlines. In sentencing Carfora in March 1972, Judge Gurfein noted, among other things, that Carfora had had no other recent trouble with the law and was starting to develop a legitimate business. The sentence was lenient—a fine of $2,500 and two years probation, including a special condition that Carfora make full restitution to the defrauded airlines by April 1, 1972.

On June 20, 1972, the United States Probation Office filed a petition to revoke Carfora's probation charging him with failure to make restitution. At a hearing on June 26, Carfora admitted the default but pleaded inability to pay because of assorted unforeseen business difficulties. Expressing an unwillingness to "punish a man if he doesn't have money to pay," Judge Gurfein declined to find a violation of probation and modified the special condition of probation to permit Carfora to make restitution in the form of installment payments.

On August 16, 1972, a second petition to revoke probation was filed in the district court. This time the Probation Office charged that Carfora had violated the conditions of probation by: (1) making a first installment payment of $390 to Eastern Airlines with a check that "bounced"; (2) failing to make a July restitution payment of $364.65 to Trans World Airlines; (3) failing to report to his proba-

tion officer on August 15, 1972.[1] At a hearing in September, Carfora did not deny the first two charges; rather, he again excused his failure to make restitution on the ground that he was unable to pay, this time claiming both illness and business difficulties. With respect to the third charge, he claimed an innocent mistake about the scheduled date of the meeting with the probation officer. Judge Gurfein reserved decision pending further inquiry into Carfora's financial situation, and ordered Carfora to make his financial records available to the Government. Five more hearings were held,[2] at which the Government introduced, among other things, extensive evidence of Carfora's various shady dealings with his creditors.

Finally, on May 4, 1973, the judge revoked Carfora's probation, and sentenced him to a two-year term of imprisonment, four months to be served in prison, with the remainder of the sentence suspended. In a written opinion, the judge first recounted the history of the revocation proceedings and then restated the charges specified in the Government's petition of August 16, 1972. See note 1 supra. After declaring that he would accept appellant's explanation for his failure to meet with his probation officer, the judge noted:

---

1 The specifications in the petition were as follows:

1. IN THAT PARTIAL RESTITUTION PAYMENT OF $390 BY THE PROBATIONER PAYABLE TO EASTERN AIRLINES INC., BY POST-DATED CHECK DUE AND PAYABLE ON 7/15/72, WAS RETURNED TO THE PAYEE MARKED "ACCOUNT CLOSED".
2. IN THAT THE PROBATIONER FAILED TO MAKE PARTIAL RESTITUTION PAYMENT OF $364.65 TO TRANSWORLD AIRLINES INC. (TWA) THROUGH THIS OFFICE DURING THE MONTH OF JULY, 1972.
3. IN THAT HE FAILED TO REPORT ON 8/15/72 AS DIRECTED BY THE PROBATION OFFICER.

2 On October 25, and November 29, 1972, and January 15, January 24, and January 30, 1972.

It developed that there had been instances where Carfora allegedly committed fraud upon creditors and breaches of ethical business conduct. He was informed that the Government was making these charges.

The judge then found that the Government had established 11 instances of such misconduct, including Carfora's use of different corporate and trade names to mislead his suppliers and lenders, false testimony concerning the assets possessed by his companies, creation of fictitious accounts receivable to mislead his creditors, and issuance of checks with intent to pass bad checks or with reckless disregard of the state of his bank balance, which was insufficient. Of the 11 instances cited by the judge, most supported the inference that Carfora was without funds.

The judge concluded:

> The picture presented is of a struggling, marginal small business man who is willing to rely on shady practices to keep going. He has avoided bankruptcy thus far but at the expense of unwitting lenders. His practices, as disclosed, do not show a probationer worthy of trust.
>
> It is not easy to revoke probation especially when care must be taken not to penalize penury. But I have come to the sad conclusion that probation is not enough of a deterrent for Carfora.

In this court, Carfora argues that the judgment must be set aside because his probation was revoked on a ground never charged in the revocation petition, his failure to conduct himself as an honest businessman. This, says appellant, violated his due process right to be informed of the charges against him. The Government responds that the judge revoked probation on two of the written grounds

originally charged, see note 1 supra, and even if that were not so, the judge was entitled to revoke Carfora's probation because of his fraudulent business practices.

The dispute over the basis for revocation of probation in this case underlines my own threshold difficulty with the appeal: I simply am not sure of the theory upon which the district court acted. If the judge revoked probation because Carfora was able but unwilling, to pay the restitution installments to Eastern Airlines and Trans World Airlines, it may be that this ground for decision would be sufficiently supported by the evidence. However, the district court made no finding that Carfora had the financial means to make the installment payments, a crucial issue under our holding in *United States* v. *Wilson*, 469 F.2d 368 (1972). See *United States* v. *Taylor*, 321 F.2d 339, 341-42 (4th Cir. 1963). Indeed, the judge's opinion suggests in its description of Carfora as a struggling businessman who has managed to stave off bankruptcy only by defrauding creditors, that the court believed appellant to be in serious financial difficulty. Initially, the evidence concerning Carfora's shady business practices was initially admitted to impeach appellant's description of his financial situation. Despite this, the record supports Carfora's position that at least during and after the third hearing the Government presented Carfora's allegedly unethical business dealings as an independent ground for revoking probation.[3] And the district court's discussion of these deal

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3 The judge opened the November 29, 1972 hearing by stating:

> The purpose of this hearing was to enable the Government present evidence other than merely evidence that Mr. Carfora unable to make restitution for financial reasons.

In response, counsel for the Government stated:

> The Government at this point is ready, although not today, to two things, and one is to prove that Mr. Carfora deliberately fail

ings, which constitutes the bulk of its opinion, makes no mention of the limited purpose for which evidence concerning them was initially received; in fact, it refers to the alleged instances of unethical conduct as "charges" which the Government was making against appellant. Thus, it appears quite possible that this conduct provided the basis for the court's decision to revoke probation.

If this is so, however, other issues immediately become significant. There is no question that the demands of due process extend to proceedings for revocation of probation. *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972).[4] Carfora contends that an essential element of due process is written notice of the specific charges which form the basis of an attempt to revoke probation. *Gagnon*, 411 U.S. at 786; *Morrissey*, 408 U.S. at 488-89. The Government does not claim that it ever filed a written amendment to its petition or specification of charges, as it apparently represented it would. See

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to make restitution and that he did have funds available with which he could have made restitution.

The second is that the Government believes it will be prepared to prove *that Mr. Carfora committed crimes after March, 1972, and will be able to file an amended or supplemental probation violation.* [Emphasis added.]

Later in the same hearing, Judge Gurfein remarked to Carfora:

There is only one reason I haven't revoked your probation, and that is because I don't want to put a man in under circumstances where it looks as though I am doing it because he is a poor man and for no other reason, but it seems to me the thing bristles with other reasons, if it develops.

4 In *Gagnon* (probation) and in *Morrissey* (parole), the Supreme Court addressed itself to the requirements of due process in revocation proceedings before administrative officials. I see no reason why such requirements would not be at least as strict where the revocation proceeding is held before the sentencing judge.

note 3 supra.[5] Instead, the Government argues that th requirements of due process were met since Carfora re ceived oral notice of the additional charges and a full op portunity to confront and controvert the evidence agains him. I express no view on these issues, except to observ that the due process questions are substantial. (Contrast for example, the generality of the oral notice, quoted i note 3 supra, with the specifity of the written charges i the revocation petition, quoted in note 1 supra.) However I think it inappropriate to consider and decide grave con stitutional issues, if this is unnecessary.

Accordingly, I would remand so that the district cour can clarify the basis of the probation revocation, makin such supplemental findings, on the record as it now exists as are appropriate. For the reasons already stated, affir mance on the present record is unjustified.

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5 It is notable that, at the very last hearing on January 30, 1973, th judge stated to counsel for the Government:

> What I need from you is a succinct statement of what you clai are the grounds for the revocation of probation, and you can hav the assistance of the probation department in that. Get that fo me, we will close the hearings then and I will see what we can d

Subsequently, after all the evidence was in, the Government did pr duce a memorandum of law listing the specific charges of unethic business conduct it was making against Carfora.

APPENDIX B

OPINION OF THE DISTRICT COURT
(Filed May 4, 1973)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

71 CR 31

UNITED STATES OF AMERICA,

-against-

JAMES CARFORA,

Defendant.

GURFEIN, D.J.

The defendant was convicted after a jury trial of mail fraud, 18 U.S.C. Section 1341 and on March 6, 1972. I suspended imposition of sentence, put the defendant on two years probation, directed him to pay restitution to the airlines he had defrauded and imposed a fine of $2,500 to be paid in installments.

Several considerations influenced the Court to put the defendant on probation instead of imposing a jail term. (1) It was recommended by the Probation Department; (2) he had not been in trouble with the criminal law for seven years; (3) he was quite ill with a recurring stomach ailment; (4) he had started to develop a legitimate business; (5) he had had a miserable childhood as an

orphan without roots and (6) his mental stability was open to serious question.

The probation office seeks to revoke his probation. On June 20, 1972, the probation officer filed a petition charging the probationer with violating the provision that he make restitution. The Court held a hearing on June 26, 1972 after notice to Carfora. The Court stated that it would not consider poverty as a proper ground for revocation, modified the restitution schedule and required Carfora to make payments to the airlines thereafter through the probation department. At the hearing Carfora stated that he had mailed a check to TWA in the sum of $364.65. It appeared later that the check was not received by TWA.

On August 16, 1972, the probation officer filed a petition charging that Carfora had violated his probation in three respects: (1) that he had made a first installment payment to Eastern Airlines with a check that "bounced"; (2) that he failed to make the July restitution payment he had been ordered to pay to TWA; (3) that he failed to report to the probation officer on August 15, 1972.

With respect to the last item Carfora claims that there was a mix-up in dates and I shall give him the benefit of doubt.

It developed that there had been instances where Carfora allegedly committed fraud upon creditors and breaches of ethical business conduct. He was informed that the Government was making these charges.

Opinion of the District Court

A hearing was held on September 14, 1972 and was adjourned to October 10, 1972 with a direction that Carfora produce his books and records. There were several adjournments because the records supplied were not complete.

When the United States Attorney had had an opportunity to analyze the records, the hearing was resumed on January 15, 1973. A further hearing was held on January 24, 1973. Testimony was taken, principally from creditors, bank records were received and the probationer testified in his own behalf. The parties were given time to submit memoranda on the facts adduced.

I find that the Government has established the following: (1) Carfora used different corporate and trade names to misrepresent the make-up of his business to the detriment of suppliers and lenders. (2) He has falsely testified that Worldwide Electric Corporation had acquired New York Power and Construction (Govt. Ex. 6). (3) He swore falsely that Worldwide owned no automobile when it did own a truck. (4) He used fictitious accounts receivable to induce Cambridge Sales Co. and Louis Goldman to lend money to Worldwide. He listed one receivable in the name of John J. Ventura — which was really Carfora himself. He admitted under oath in a supplementary proceeding involving Worldwide, of which he was the owner, that he had listed an account receivable from the New York Telephone Company in the amount of $17,000, that the receivable was non-existent and that it was "an act of fraud . . . to obtain money from Cambridge Sales Co." (Ex. 7 at 21-22). (5) To explain a loss of assets, he has given varying versions of being "robbed" on April

13, 1972 and on April 5, 1972, an incident he reported to the police only on June 25, 1972, the day before the scheduled revocation hearing in this Court. (6) He gave J.E. Allbright & Co. from whom he had purchased a photocopy machine a check for $685.54 dated May 15 which when presented the following day was returned for insufficient funds. (7) On July 11, 1972, Carfora had a car repaired for Worldwide for which he drew a check on July 11, 1972 in the amount of $102.51 on his New York Power and Construction Account No. 02158 at The Chase Manhattan Bank. On that day the account was overdrawn in the amount of $414.90. The Bank returned the check for insufficient funds on July 14, 1972. (8) While Carfora made it a practice to issue post-dated checks, there are a sufficient number of non post-dated checks (Ex. C) which were returned for insufficient funds to indicate intent to pass bad checks or at least, a reckless disregard of the state of the bank balance. (9) On July 14, 1972 Carfora deposited his own $10,000 check in the Chase Manhattan Bank which was returned unpaid on July 25, 1972 because there was no account in the drawee Bank branch. (10) For the period from June 29, 1972 to August 7, 1972 an anaysis of the New York Power and Construction account at the Chase Manhattan Bank shows that 78 checks were drawn and returned for insufficient funds. (11) Carfora converted to his own use an account receivable of Emulsion Stripping which had been pledged to Cambridge Sales, a factor.

The picture presented is of a struggling, marginal small business man who is willing to rely on shady practices to keep going. He has avoided bankruptcy thus far but at the

expense of unwitting lenders. His practices, as disclosed, do not show a probationer worthy of trust.

It is not easy to revoke probation especially when care must be taken not to penalize penury. But I have come to the sad conclusion that probation is not enough of a deterrent for Carfora.

I am revoking the probation and will impose a sentence.

s/ M.I. GURFEIN
U.S.D.J.

Dated: May 4, 1973.

OCTOBER TERM, 1973

No. 73-972

JAMES CARFORA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of nine counts of mail fraud, in violation of 18 U.S.C. 1341. On March 6, 1972, he was sentenced to two years' probation and a $2,500 fine. As a special condition of probation, petitioner was ordered to make full restitution to the three airlines victimized by his mail fraud no later than April 1, 1972.

On August 16, 1972, a second probation revocation petition was filed with the district court[1] charging that

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[1]An earlier revocation petition had been filed on June 20, 1972, charging that petitioner had failed to make restitution as ordered. After a hearing, the district court entered an order finding no violation and imposing a special condition to provide for specifically scheduled restitution payments.

petitioner had violated his probation in three respects: (1) his restitution check for $390 to Eastern Airlines was returned marked "account closed;" (2) the partial restitution payment of $364.65, scheduled to be paid to Trans World Airlines in July 1972, was never made; and (3) he failed to report to the probation officer on August 15, 1972, as directed.

A hearing to determine the validity of these charges was commenced before the district court on September 26, 1972; at the court's direction, this hearing was continued on five separate occasions to allow for the production of additional evidence.[2]

At the initial hearing on September 26, 1972, petitioner admitted, through his attorney, that the charges alleged in the August 16, 1972, probation revocation petition were substantially correct. At subsequent hearings, testimony was presented which demonstrated that petitioner had stated, in a deposition in a pending civil suit, that he possessed a diamond ring valued at $7,000. In addition, petitioner had loaned an individual $300 in November 1972, and on January 30, 1973, possessed various valuable assets, including jewelry and coins.

Petitioner, testifying in his own behalf, offered a series of explanations for his admitted failure to comply with the trial court's schedule of restitution payments and for his other apparent probation violations (Tr. 3—9/26/73).

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[2]The subsequent probation revocation hearings were held on October 25 and November 29, 1972, and January 15, January 24 and January 30, 1973.

These explanations included his alleged poor physical condition, his having been "robbed" and his financial difficulties (Tr. 9/16/—9/26/73).[3] On May 4, 1973, the district court revoked petitioner's probation (Pet. App. 11a-15a) and sentenced him to a term of imprisonment for two years, four months to be served in prison and the remainder suspended; additionally, petitioner was placed on probation for two years to commence upon expiration of his confinement. The court of appeals, one judge dissenting, affirmed (Pet. App. A).

1. Petitioner avers that the district court erred in revoking his probation in that it failed to make findings of fact as to the basis of its ruling and ordered revocation despite "overwhelming evidence" that petitioner lacked the funds to make restitution (Pet. 10-11). The majority below, however, put these claims to rest when it found (Pet. App. 4a):

> The record as a whole clearly establishes that Judge Gurfein intended to, and did, revoke [petitioner's] probation on the grounds that he did not fail to make the payments to the airlines because of penury and that he did have the means to pay.

This conclusion is supported by the testimony at the various hearings and a careful reading of the district court's order revoking probation. For example, on November 29, 1972, the district court stated that the purpose of the hearing was to allow the presentation of evidence by the government to refute petitioner's claim of impecun-

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[3]Petitioner offered varying descriptions and dates of an alleged robbery of his business premises in an effort to explain the loss of certain assets. He advised on of his creditors that he had been robbed on April 5, 1972. He testified on June 26, 1972, that the robbery had taken place on Arpil 13, 1972. However, on January 30, 1973, he testified that he had not in fact been robbed, but had been subject to a lawful attachment of assets by one of his judgement creditors.

iousness (Tr. 3—11/29/73). The prosecutor stated that the government would prove petitioner deliberately failed to make restitution and that he did have funds available. In addition, on January 15, 1973, the prosecution stated that it would prove instances of fraud committed by petitioner after his sentencing as evidence that he was deliberately attempting to mislead the court (Tr. 1—1/15/73).

During the course of these hearings, petitioner made no effort to challenge the initial charges set forth in the revocation petition or rebut the evidence contradicting his defense of insufficient financial resources. Rather he relied on a series of explanations, the validity of which had been seriously questioned. After detailing petitioner's business dealings and practices, the district judge concluded that petitioner had not been truthful in claiming an inability to make restitution, finding that his "practices, as disclosed, do not show a probationer worthy of trust" (Pet. App. 15a). We submit that, as the violations were conceded, it was unnecessary for the district court to make specific findings on any issue other than whether the violations were willful. Moreover, the district court holding that petitioner did not commit the infractions charged in the third specification in the revocation petition refutes any suggestion that it did not find the other two specifications proved.

2. Petitioner further claims that the district court revoked his probation because of his fraudulent business practices, a violation not encompassed in the written revocation petition.[4] As already discussed, this claim is not well taken.

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[4]Judge Feinberg in dissent was of the view that the district court's opinion did not make clear the basis of the revocation order and believed the cause should be remanded for specific findings in that regard (Pet. 4a-10a).

But even assuming *arguendo* that the district court did base petitioner's revocation on a violation not specifically charged in the written petition, we submit that in the circumstances of this case, no deprivation of due process resulted thereby. Petitioner does not claim that the findings made by the district court regarding his business practices were erroneous. Moreover, it is clear that petitioner's conduct in this regard was in violation of the district court's probation order,[5] and thus could properly be relied on by Judge Gurfein as a ground to revoke probation. See *United States* v. *Wilson*, 469 F. 2d 368, 370 (C. A. 2).

Gagnon v. *Scarpelli*, 411 U.S. 778, and *Morrissey* v. *Brewer*, 408 U.S. 471, should not be so rigidly construed as to require an automatic finding of a denial of due process whenever there is the least deviation from the requirements there set forth. At the core of those decisions was this Court's statement in *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 484:

> What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior.

That directive was scrupulously adhered to in the instant case. Petitioner was accorded an extensive revocation hearing and was assisted by counsel. Although his fraudulent business practices were not included among the specifications in the written petition to revoke probation, he was afforded oral notice thereof. The facts surround-

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[5]The probation order provided in relevant part that petitioner "refrain from violation of any law (federal, state, and local)" and "live a clean honest and temperate life."

ing these practices were fully developed at the hearings, at which petitioner and counsel were present and able to confront witnesses and controvert the evidence. Moreover, petitioner was on notice as early as October 25, 1972, that Judge Gurfein proposed to consider his business activities while on probation (Tr. 2—10/26/72).

The purpose of requiring written notice of the charges and a hearing at which the probationer may call and confront witnesses is to provide "substantial protection against ill-considered revocation." *Gagnon* v. *Scarpelli, supra,* 411 U.S. at 786. There was no "ill-considered revocation" here. Indeed petitioner does not contend that the matter of his fraudulent business practices was raised without warning or that he was not given a full opportunity to refute the evidence against him. Rather, he claims that lack of written notice constitutes a *per se* violation of due process. Such a reading of *Gagnon* and *Morrissey* in the present context exalts form over substance and in no way advances the fundamental principles announced by those decisions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

DOJ-1974-05